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No. 80-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

Petitioner,

VS.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

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I

RESPONDENTS IGNORE THE PRACTICAL EFFECTS OF THEIR POSITION

Respondents ignore or shrug off the practical effects of the North Carolina doctrines they seek to uphold. But it is

those very considerations that mandate reversal. First, it must be understood that if the NCGA can succeed here, every policyholder in every state in which there is a deposit can accept the benefits of a proposed rehabilitation, including insurance coverage over an extended period, sit back and see how it goes, then bring suit at any time up to the limitations period to foreclose on the desposit. Respondents admit that they would force a rehabilitator in the state of domicile—which is after all, a state agency—to sue in every state in which there is a deposit even if there is no dispute over the proposed plan of rehabilitation (Resp. Br. 27). For the reasons set forth in UNAC's principal brief, the reality of such a mess is that rehabilitation may be rendered impractical.

Respondents also seek to frame their contentions in terms of the North Carolina policyholders' interests. But the NCGA makes the policholders whole. No policyholder is helped or hindered by any disposition of this case. Moreover, the state officers in North Carolina and every other state were notified of the proposed plan before it became effective precisely because the various insurance departments are better equipped than the individual policyholders to evaluate the proposal from the policyholders' standpoint. The complexity of insurance and the difficulty of such an analysis is why each state has an insurance commissioner. But the time for the North Carolina commissioner to perform that job expired in 1976 with the entry of the Final Judgment adopting the Plan.

It is also important to note that respondents' arguments prove too much. If respondents were correct, several mini-rehabilitations around the nation would have been required even if no policholder had sued UNAC in any state. And this would be true even if no one objected to the domiciliary state's jurisdiction and no one wished to sequester a deposit. In short, jurisdiction of the domiciliary state limited to an adjustment of the policyholders' claims is necessary as a practical matter.

Moreover, North Carolina seeks to obtain more by its belated attack than its policyholders would have received if they had made a timely move to obtain the deposit. The policyholders have received and are receiving insurance coverage. And the benefits of ongoing insurance may—and here did—outweigh the benefits of grabbing the deposit.[1] The NCGA by its belated attack would *add* the deposit to these benefits, not *substitute* it for them. The latter would have been the result of a pre-rehabilitation claim. The former is wholly unfair to UNAC and its policyholders in other states.

Finally, the NCGA in Part IV of its brief offers no semblance of an explanation why it had no "notice" of the subject matter of the 1978 Indiana proceeding or why as an intervening plaintiff it was not subject to the jurisdiction of the Indiana Court.

II

RESPONSE TO NEWLY RAISED POINTS

Respondents have advanced a number of contentions for the first time in this Court. None has any merit. Taking them in descending order of frequency of appearance in respondents' brief:

A. The Claim That The Indiana Court Was Misled Is Procedurally And Substantively Meritless

This contention—raised for the first time in this Court—is preposterous. First, if there were any basis to such a claim, it was properly raised in the 1978 proceeding in Indiana. It was not presented in Indiana. Nor was it raised in the North Carolina courts. Second, the Indiana Court's

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[1] Indeed, in Canada where full faith and credit does not make the Indiana Final Judgment binding, deposits were nonetheless not enforced and the Plan was adopted by a proceeding in the Canadian courts (R. 30, Ex. Bd. 296).

1978 judgment, findings and conclusions (Pet. App. 37A-38A) make clear it understood the North Carolina deposit could have been sequestered if a pre-rehabilitation claim had been timely asserted by a North Carolina policyholder or the NCGA as assignee of a North Carolina policyholder. Third, petitioner (UNAC) was under the control of the Indiana Department of Insurance at the time it was in rehabilitation. The Plan that ultimately became the final rehabilitation judgment was authored by the State of Indiana acting through its insurance commissioner. Fourth, the Plan was sent to the North Carolina insurance commissioner who, from the first days of the rehabilitation, had called the North Carolina deposit to the NCGA's attention (R. 23, Ex. Bd. 26). To contend that the North Carolina officials and the NCGA—an association of North Carolina insurance companies—did not know the nature of the deposit is not only without basis in the record, it is inherently unbelievable. Fifth, UNAC is aware of no statutory or other procedure by which a deposit could be posted in a state outside the insurer's domicile except to secure claims of insureds in the state receiving the deposit. In short, the "misled court" argument is hokum.

B. All Policholders, State Insurance Commissioners And Guaranty Associations Were On Notice Of The Plan

Similarly, there is no substance to the claim that the NCGA had no notice of the proposed effect of the Plan. Respondents claim (Resp. Br. 17) that the NCGA first learned of UNAC's position in a 1977 exchange of letters. If this is an assertion of fact—*i.e.*, a report of the subjective state of awareness of NCGA's management—it bears no support in the record. It is irrelevant in any event. It makes no difference whether the NCGA actually read the Plan. The point is it received a copy of both the proposed plan and the final Plan. And if the claim of lack of notice is a legal conclusion, it is flat wrong. The Plan in numerous provisions made clear that all claims of any nature against

UNAC or its property would be compromised (J.A. 59, 62, 75, 80). In that respect the final provisions are virtually identical to the provisions of the proposed plan (R. 30, Ex. Bd. 118, 120, 129, 132). The Plan plainly put everyone—including the North Carolina commissioner and the NCGA—on notice that it would terminate all claims against UNAC.

If this were not enough, the "notice" is not a prospectus and is not required by any federal constitutional doctrine to be one. The quote from *Mullane v. Central Hanover Bank* appearing at page 43 of respondents' brief relates to the *manner* of notice (mail, publication, etc.) and whether or not the person being noticed learns anything at all. It has nothing to do with *content* of the notice. More important, any policyholder who read the 1976 notice (J.A. 21-25) could glean the essentials of the proposed plan. Indeed, the entire text of the proposed plan was enclosed (R. 30, Ex. Bd. 175, 117-32). The notice was intended to be intelligible and to convey the essentials of a complex situation. It is more than adequate for that purpose. Anyone who wishes more detailed information is free to ask for it. But all that "notice" requires is that the time and place and subject matter of the hearing be given. To underscore this, the proposed plan could be changed as a result of testimony at the final hearing, and anyone who failed to show up has no complaint. In sum, if a defect in the content of the notice is alleged, it surely did not amount to a lack of due process. As a result, the 1976 Final Judgment and Plan is entitled to full faith and credit. In any event, the 1978 Order of the Indiana Court is entitled to full faith and credit.

C. The Indiana Final Judgment Does Not "Void" Or "Render Nugatory" The North Carolina Law

The effect of the Indiana Court's 1976 Final Judgment was (a) to compromise all pre-rehabilitation claims of all policyholders, and (b) to leave the North Carolina deposit in North Carolina as security for any future breach of

UNAC's post-rehabilitation obligations. As such, the North Carolina statute is fully honored. If there had been such a pre-rehabilitation suit in North Carolina (or a claim in the Indiana rehabilitation proceeding) to sequester the desposit for North Carolina policyholders, it might well have prevailed. Neither occurred. And if there is a future breach by UNAC, the deposit is there for the North Carolina policyholders. All the rehabilitation did was exchange ongoing insurance for a settlement of all past claims.

Indeed, the very passage quoted by respondents (Resp. Br. 30) to support the idea that deposits in other states are for the benefit of policyholders in the state of deposit recognizes that their claims may be "paid or extinguished." 2 *Couch on Insurance* § 22:96 (2d ed. 1959). Here the North Carolina claims were extinguished. The question is not whether the North Carolina policyholders could have proceeded against the deposit. It is whether, since they do not do so, the state of domicile could wrap up the rehabilitation. As to that, the limited jurisdiction conferred by Indiana law on the Indiana Rehabilitation Court is sufficient.

Respondents sometimes suggest that the Indiana Court adjudicated that the deposit "was a general asset" of UNAC. That is only somewhat accurate. The Indiana Court's Final Judgment had the effect of compromising the policyholders' claims. In all calculations of liquidation ratios, etc., all assets of UNAC everywhere were treated the same. In that sense the Plan treated the deposit as a "general asset." But the Plan does not purport to limit the North Carolina policyholders' rights in the event of a future breach. In that sense the deposit is still "in trust." And the Plan did not hold that a North Carolina policyholder could not have moved against the deposit up to the 1976 Final Judgment. All the Plan held was that claims against the asset or otherwise based on UNAC's pre-rehabilitation

breaches are compromised and settled, effective as of the 1976 Final Judgment. Since there is no present default by UNAC, there is no basis for liquidating the deposit.

D. The Indispensible Party Argument

Respondents contend that the officials of the State of North Carolina are essentially "trustees" and were therefore indispensible parties to the Indiana proceeding. This does not do the job. First, whether the rights of the policyholders as "beneficiaries" can be adjudicated in the absence of the state officer as "trustee" is a matter of Indiana state procedural law. If Indiana holds—as it does—that its courts can bind the policyholders and the NCGA by proceeding as the Rehabilitation Court did, the only issue left is whether Indiana has the jurisdiction to do so. Full faith and credit leaves nothing to be decided in North Carolina. The only Indiana authority is the trial court decision now on appeal to the Indiana Court of Appeals. That decision implicitly rejects the claim that more needed to be done with respect to the North Carolina officers than was done. It does not explicitly meet the point because the claim was not raised in Indiana. If it had merit (which it does not) it could have been presented to the Indiana courts.

Second, to call the officials "trustees" is only the beginning of analysis. Unlike conventional trustees, they have no discretion to do anything except liquidate the deposit and apply it to claims "upon application of the party to whom the debt or money is due." N.C. Gen. Stat. § 58-184. A more accurate description is escrow agent, not "trustee." But however the officers are denominated, the power of an Indiana court to adjudicate the claims of the policyholders against UNAC in their absence is purely a question of Indiana law, assuming, as is the case, the Indiana Court has jurisdicion *in rem* or personal jurisdiction over the policyholders or their claims.

Third, the State of North Carolina did get the same notice of the proposed plan as each policyholder received. (J.A. 21-

25; R. 30, Ex. Bd. 175, 117-32). To the extent the State of North Carolina was a necessary party, it had an opportunity to have its day in court.

E. The Commerce Clause Argument Was Properly Raised Below

UNAC asserted full faith and credit as a defense in its initial answer (J.A. 107) to the NCGA's complaint and has pursued that point at all stages of this suit. Respondents suggest, however, that commerce clause objections to what now appears to be North Carolina's indispensible party argument were not timely raised. UNAC first pointed to the commerce clause in its Notice of Appeal to the Supreme Court of North Carolina because the North Carolina Court of Appeals' decision for the first time may have indicated that these officials, as a matter of North Carolina state law, may have some interest in the deposit that precludes adjudicating the policyholders' rights in the absence of the officers. To the extent this is an element of the basis of North Carolina's sustaining a post-rehabilitation attack based on pre-rehabilitation breaches, no such contention was advanced below. The North Carolina statute does not suggest that the officials have any such interest. Nor do the numerous cases dealing with other nationwide rehabilitations suggest that all 50 insurance departments are necessary parties. Under these circumstances, the issue was timely raised for purposes of this Court's jurisdiction because no one had contended that the officials had any interest until the North Carolina Court of Appeals rendered its opaque opinion. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930). UNAC is uncertain as to the theoretical underpinnings of the North Carolina Court of Appeals' decision. UNAC submits that the full faith and

credit clause is all this Court needs to consider to hold for UNAC. But to the extent the North Carolina decision does turn on an indispensible party doctrine, UNAC's commerce clause objections as presented in the petition for certiorari are preserved.

Respectfully submitted,

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